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80-1972

No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

MICHAEL CLEMENTE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Questions Presented.*

I. Whether the so-called "RICO" Act (18 U.S.C. §§ 1961 *et seq.*) is applicable to an enterprise which, according to the government, consists of a group of individuals "associated in fact to corruptly control and influence" an industry?

II. Whether the defendant's conviction of RICO conspiracy must still be reversed even if the government's theory of enterprise is sustained?

III. Whether all the remaining counts must also be reversed for a new trial if the RICO and RICO conspiracy counts are reversed, because they were inevitably tainted by the spillage from the RICO counts?

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* The parties to this case, aside from petitioner and the government, are petitioner's co-defendants at trial and on appeal: Thomas Buzzanca, Vincent Colucci, Carol Gardner, Michael Copolla and Gerald Swanton.

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MICHAEL CLEMENTE,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Opinion Below.

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided February 26, 1981, is annexed as an appendix to the petition for certiorari in the companion case of Tino Fiumara, Thomas Buzzanca and Michael Coppola. Petitioner herein relies on and incorporates that appendix.

Jurisdiction.

a) The judgment of conviction was rendered the 20th day of June, 1980.

b) The order and judgment of affirmance of the United States Court of Appeals is dated the 26th day of February, 1981. On April 22, 1981, Mr. Justice Thurgood Marshall issued an order extending the time for filing this petition to May 27, 1981. That order is attached to this petition as an appendix.

c) Jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved.

The constitutional provision involved is the Due Process Clause, Fifth Amendment, United States Constitution.

The statutes involved are 18 U.S.C. §§ 1961(4), 1962(a), 1962(b), 1962(c) and 1962(d). These have been reproduced in the appendix of the companion petitions and are relied on by petitioner.

Statement of the Case.

Petitioner Clemente, a private businessman, was charged with being part of a small group of men who sought to control the unions and businesses on the waterfront. The group with which he was allegedly associated had no formal structure or legitimate purpose. It was, according to the government, essentially a conspiracy. Yet petitioner was charged with a violation of the RICO statute and also with conspiracy to

violate the RICO statute. The RICO "theory" constituted the basis, as well, for the other charges brought against petitioner.

Appellant Clemente stands convicted of 103 counts of violating federal law and sentenced to 20 years of imprisonment (a sentence, in effect, of almost certain life imprisonment, considering his age — 73 — and the parole guidelines applicable to his case). Broken down to their constituent acts, Clemente's 103 convictions actually reflect only three alleged sets of transactions.

The first set of transactions consisted of the receipt of $42,000 in payments from William Montella, an employee of the Quin Companies "as a condition of and in exchange for Quin's obtaining and retaining carpentry and lashing business" from the Netumar Shipping Lines ("Netumar"). The receipt of this money — paid in monthly installments over a four and a half year period — was broken down by the government into 56 separate counts of extortion. Clemente was convicted of each count of extortion, despite the undisputed fact that there was no "physical fear or fear of violence" in this case. Nor was Clemente an official or employee of any union, corporation or government. He is a self-employed private businessman who received payment for helping a company obtain and retain lucrative business from another company.

The second set of transactions involved an isolated conversation with William Montella about monthly payments of $2,000 that Montella had already been making to defendants Gardner and Colucci from June, 1975 until December, 1975. When Gardner and Colucci apparently attempted to increase the monthly payment rate, Montella went to see Clemente for advice. According to Montella, at this meeting Clemente told him not to pay Gardner and Colucci and to go see Mr. Buzzanca. The crux of the government's case against Clemente is what Montella claimed Clemente said in addition to these

statements: namely that he told Montella that since he had made a commitment he now had to live up to it. Although there is absolutely no evidence that appellant Clemente was aware that any payments were actually made by Montella to Buzzanca following his conversation, and although the effect of Clemente's involvement was to prevent the payment of additional money allegedly being demanded of Montella, Clemente was charged with, and convicted of, 34 separate counts of aiding and abetting 34 separate violations of the Taft-Hartley Act (each count representing an installment paid by Montella to Buzzanca without Clemente's knowledge).

The third, and most peripheral, set of transactions related to Clemente's alleged failure to report and pay income tax on the money he received from Montella as alleged in the extortion counts, and for a far greater amount of money he received from Netumar. Clemente was charged with, and convicted of, 10 separate counts relating to his income taxes: 5 counts of tax evasion for the years 1973 to 1977; and 5 counts of filing false returns relating to the same income during the same years.

These three sets of transactions accounted for 101 of the 103 counts on which Clemente was charged and convicted. The remaining two counts — RICO and conspiracy to commit RICO — were built on the foundation of the extortion and Taft-Hartley convictions and charged Clemente with being associated with and conspiring with an "enterprise, to wit, a group of individuals associated in fact to corruptly control and influence the waterfront . . . ."

Reasons for Granting the Writ.

I. The Government's Theory of Enterprise was Improper under the RICO Act.

This case squarely raises an issue currently pending before this Court over which the Circuits are irreconcilably divided:

whether the RICO Act (18 U.S.C. §§ 1961 *et seq.*) is applicable to an enterprise which, according to the government, consists of a group of individuals "associated in fact to corruptly control and influence" an industry.

The government tried this case on the theory that the RICO enterprise at issue was an "association in fact" formed for the very purpose of committing the criminal activity charged in the indictment. Counts 1 and 2 of the indictment described the enterprise as:

> a group of individuals associated in fact to corruptly control and influence the waterfront industry in the Port of New York and other ports in the Eastern United States and to enrich themselves and their associates.[*]

The convictions were affirmed squarely on the holding of the Second Circuit that "the term 'enterprise' embraces both legitimate and illegitimate enterprises." The Court of Appeals acknowledged that there was a "split of authority on this issue" among the circuits. There is such a split, and the circuits which have held that the RICO Act was not intended to apply to allegedly unlawful associations in fact — such as the one alleged here — are plainly correct.

The recent opinions in *United States* v. *Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 101 S.Ct. 938 (1981), and *United States* v. *Anderson*, 626 F.2d 1358 (8th Cir. 1980), demonstrate that a case which proceeds on such a theory of enterprise is fundamentally at odds with the structure, logic and legislative history of the RICO statute. Indeed, the opinions in *Turkette* and *Anderson* speak so convincingly for themselves that there is no need for defendant to paraphrase them here. Suffice it to say that defendant fully relies on each

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[*] See also T. 11424, where the prosecutor quoted this language in his summation.

of the points made by these opinions, and submits that this Court must conclude that the theory of enterprise on which the present case was tried is untenable.

The legislative history of the RICO Act has also been elaborated in the *Anderson* and *Turkette* opinions, as well as in the briefs submitted before this Court in the latter case. They will not be repeated here.

If this Court affirms the *Turkette* decision, petitioner respectfully requests it to reverse these present convictions, or — at the very least — remand them to the Court of Appeals for reconsideration in light of the *Turkette* decision.

II. Even if the Government's Theory of Enterprise is Sustained, the Defendant's Conviction of RICO Conspiracy must still be Reversed.

A. *If the Government's Theory of Enterprise is Accepted, the Crime of RICO Conspiracy Becomes Unconstitutionally Vague and Unintelligible.*

One of the problems created by defining enterprise to include an association in fact formed for the very purpose of committing a pattern of racketeering activity, is that it renders the enterprise element indistinguishable from a simple conspiracy to commit the predicate crimes. This in turn makes it impossible to fathom the meaning of a conspiracy under 18 U.S.C. § 1962(d) to violate 18 U.S.C. § 1962(c).

If this Court rejects *Anderson* and *Turkette*, and accepts the government's theory of enterprise, it will have no choice but to attempt to negotiate the definitional Serbonian bog which the *Anderson* court avoided. No intelligible definition of a § 1962(d) conspiracy to violate § 1962(c) would be possible.*

* Indeed, the Eighth Circuit in *Anderson* found that defining enterprise in the way indicated made it so difficult to understand the nature of a § 1962(d) conspiracy to violate § 1962(c), that this difficulty itself demonstrated the need to reject such a definition of enterprise.

The substantive offense described in § 1962(c) has two distinct parts. First, a person must be "employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce." Second, that person must "conduct or participate, directly or indirectly, in the conduct of [that] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." While § 1962(d) states that it shall be unlawful to conspire to violate § 1962(c), it does not specify how the factor of conspiracy should be applied to the two parts of the substantive offense. There are at least *two* possibilities: First, § 1962(d) may be saying that it is unlawful to conspire to *both* (a) join an enterprise, *and* (b) participate in the affairs of that enterprise through a pattern of racketeering. Second, § 1962(d) may be saying that it is unlawful for a person who is *already* a member of an enterprise, to conspire to participate in the affairs of that enterprise through a pattern of racketeering. If enterprise is defined as including a group of persons associated in fact to commit a pattern of racketeering activity, *neither* alternative is intelligible. The first alternative becomes incomprehensible because it makes no sense to speak of someone conspiring to join a group of persons associated in fact, or, more simply, of someone *conspiring to conspire*. The second alternative also becomes incomprehensible because, given the government's definition of enterprise, this alternative, when spelled out, turns into the following:

> It shall be unlawful for any person engaged in a conspiracy to commit a pattern of racketeering activity which affects interstate commerce to conspire to participate in the conduct of the conspiracy's affairs through a pattern of racketeering activity.

Needless to say, if, as demonstrated above, RICO conspiracy is *incomprehensible*, it is necessarily unconstitutional under the void-for-vagueness doctrine established in such cases as *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-403 (1966); and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). Thus, for this reason, defendant's conviction of RICO conspiracy must be reversed.

B. *The Trial Judge Failed to Instruct the Jury Adequately on the Connection It Had to Find Between the Defendant Under Consideration and the Pattern of Racketeering Alleged in the Indictment.*

The trial judge's instructions on Count 2 of the indictment are characterized by an overemphasis on principles of *general* conspiracy law, at the expense of any meaningful discussion of the unique attributes of *RICO* conspiracy.

No charge on RICO conspiracy can be sufficient unless it explains in a "clear, accurate, complete and comprehensible" fashion that a person cannot be convicted of a § 1962(d) conspiracy to violate § 1962(c), absent proof that he had the specific intent to violate § 1962(c).

Since the predicate crimes alleged to constitute a pattern of racketeering activity lie at the core of the offense defined by § 1962(c), a specific intent to violate § 1962(c) must be defined in terms of a specific intent to commit those crimes. Similarly, since the element of enterprise is also central to a § 1962(d) offense, a definition of specific intent to violate § 1962(c) must also incorporate the concept of enterprise. Putting these two elements together, it is clear that, at minimum, the trial judge should have instructed the jury that it could not convict a person of RICO conspiracy unless it found that, being a member

of a RICO enterprise, he entered into an agreement with others with the specific intent to participate in the affairs of the enterprise *through* the commission of two or more predicate crimes forming part of the overall pattern of racketeering activity charged in the indictment.

Instead of instructing the jury in this way, however, the trial judge referred to the element of intent only in the most general way, as follows:

> In a conspiracy case, the government must prove beyond a reasonable doubt that the defendant entered into the conspiracy with a criminal intent, with a purpose to violate the law. [T. 12619.]

The judge never applied this concept of intent to the concept of the elements of § 1962(c). Such a combination was essential to a proper definition of the specific intent which the jury was required to find. Without this combination, the judge's comments about intent remained hopelessly isolated, vague and misleading.

Indeed, not only did the judge fail to define intent in terms of the elements of § 1962(c), he referred to those elements only *once* during his entire charge on Count 2, and referred to them incorrectly at that. Thus, the judge stated:

> In this case, the defendants Clemente, Fiumara, Buzzanca, Colucci, Gardner and Copolla are charged with a conspiracy to violate the RICO statute by conducting the affairs of an enterprise through a pattern of racketeering acts. In order to find the defendant you are considering guilty of the conspiracy charged in the indictment, you must find beyond a reasonable doubt that at least two connected violations of one or both of the two statutes

> that I have just described to you in connection with Counts 3 through 142, were objectives of the conspiracy. [T. 12614-12615.]

This statement is plainly incorrect. A particular defendant *cannot* be convicted of RICO conspiracy simply on the basis that *a* conspiracy of which he was a member had as *its* objective the commission of any two connected predicate crimes charged in the indictment. Rather, a particular defendant can be convicted of RICO conspiracy only on the basis that *he* entered into an agreement with the *personal* objective (*i.e.*, specific intent) of participating in the enterprise's affairs *through* the commission of two or more predicate crimes constituting a pattern of racketeering activity. In short, the trial judge's formulation totally leaves out (a) the requirement of *personal* specific intent, and (b) the requirement that a defendant intend not only the commission of predicate crimes but participation in the enterprise's affairs *through* the commission of predicate crimes.*

Consequently, defendant's conviction of RICO conspiracy must be reversed because of these critical defects in the judge's instructions.

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*The prejudice which the defendant suffered here as a result of these defects in the judge's instructions is especially apparent because of the factual issue in the case of whether, even if the government's evidence was credited, there was one RICO enterprise and one RICO conspiracy or several. Under the instructions given by the trial judge, the jury could have convicted defendant Clemente of RICO conspiracy not on the basis that *he* intended to participate in a joint Manhattan-Newark RICO enterprise through two or more predicate crimes, but rather simply on the basis that he was associated with *other* defendants, one of which *other* defendants had the intention to participate in the affairs of a strictly Newark enterprise through two or more predicate crimes.

III. If the RICO and RICO Conspiracy Counts are Reversed, all the Remaining Counts Must also be Reversed for a New Trial Because they were Inevitably Tainted by the Spillage from the RICO Counts.

The structure, tone and texture of this case were all set by the RICO and RICO conspiracy counts which headed the indictment. From the outset, the prosecutor emphasized that the government's goal in this case was to prove not merely that the defendants engaged in a series of discrete criminal acts, but that they were involved in an ongoing and all-pervasive enterprise to "corruptly control and influence the waterfront industry in the Port of New York." Indictment, Count 1, ¶ 1. Thus, in his opening, the prosecutor stated:

> At its core it is a story of a small group of men acting secretly, dishonestly and powerfully to control the unions and the businesses in this port so that businessmen in this port will believe and will act in a way that means they have to make payoffs to labor officials and the man behind labor officials in order to stay in business and in order to get business and in order to keep business. [T. 1361.]

And, the prosecutor returned to this theme in his summation [T. 11216].*

Because the RICO counts so dominated the trial of this case, established principles of law require that if the RICO convictions are found tainted, defendant Clemente must be granted a new trial on the extortion, Taft-Hartley and tax counts because they were inevitably infected by the taint.

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*See, *e.g.*, government summation, T. 11222, 11226, 11239, 11254-56, 11258, 11265, 11267, 11277, 11283, 11254, 11290, 11291, 11371, 11501.

The magnitude of the spillage from the RICO counts on the other counts of the indictment may be guarded by imagining just how different the trial of these other counts would have been absent the RICO counts:

1. Without the RICO counts, the prosecution would have been deprived of the theme of criminal enterprise which it injected into every aspect of the case. It was the RICO counts, and the RICO counts alone, which afforded the prosecution such broad license in referring repeatedly to defendant Clemente's alleged "power," "influence" and "control". And it was these counts alone which enabled the prosecution to stigmatize Clemente as "the single most important person in [the] enterprise." [T. 11217.] Ordinarily, such broad accusations of criminality, untied to specific instances of alleged misconduct, are considered to be anathema to elemental principles of due process. And if the prosecution had sought to level them in a trial limited to the extortion, Taft-Hartley or tax counts, they would certainly have been excluded under the familiar rules designed to protect a person from conviction on the ground of a supposed "criminal disposition" or "criminal character". But here the accusations were permitted, solely because of the RICO counts.

2. Without the RICO counts, the prosecution would have had no basis for joining the New Jersey defendants (Fiumara, Buzzanca, Colucci, Gardner, Copolla) and the New Jersey charges with the New York defendants (Clemente, Swanton) and the New York charges. Indeed, defendant contends that the prosecution had inadequate basis for such joinder even with RICO. Absent RICO, the arguments against such joinder — and the reciprocal prejudice which violated the rights of all defendants — would apply *a fortiori*.

3. Without the RICO counts, the prosecution would have had no basis for injecting into the trial the evidence of the more than one million dollars in payments which Netumar

made to Clemente. See Indictment, Count 1, ¶ 10. The prosecution did *not* contend that these payments were compelled by extortion or were otherwise illegal. Evidence concerning them was received for essentially two reasons: (1) to show that "Clemente in fact exercises power and influence in matters with respect to the waterfront" [T. 12686]; and (2) to show the origin of the bulk of the income which was the subject of the tax counts against Clemente [T. 12684-86]. Absent RICO, the first justification disappears, and the argument for excluding the evidence (except in a severed trial on the tax counts) becomes irresistible, especially in light of the fact that the prosecution conceded that it was *not* contending that the payments were themselves illegal. The significance of this cannot be underestimated, because the amount of money involved in the Netumar payments dwarfed the aggregate amount of money involved in the Taft-Hartley and extortion counts. Indeed, even with the RICO counts, defendant contends that evidence of the Netumar payments should have been excluded because of the inevitable and patently unfair implication that the size of the Netumar payments indicated the true scope of the alleged criminal enterprise at issue. At any rate, without RICO, it is clear *a fortiori* that the prejudicial effect would have overwhelmed any possible claim of probative value.*

4. Without the RICO counts, the underlying substantive charges against Clemente would have been seen as three isolated and ambiguous transactions. As previously demonstrated, these transactions, if presented to the jury as they should have

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*In addition to arguing its relevance on the RICO counts, the prosecution lamely argued that the Netumar payments were relevant to the extortion counts to show the reasonableness of Montella's fear that Clemente was in a position to harm him. This is precisely the kind of tenuous claim of relevance that would clearly have been outweighed by potential prejudice, in the absence of the prosecution's claim concerning relevance to the RICO counts.

been — untainted by charges of massive corruption and control — would have seemed like the actions of a legitimate business person such as an influential movie agent, and would have been viewed as entirely innocent. But when seen in the context of the RICO claims made here, they took on a sinister aspect and resulted in the conviction at issue.*

In sum, if the RICO counts are reversed, the prejudicial spillage requires that the other counts in the indictment must be reversed as well.

IV. PETITIONER CLEMENTE ADOPTS AND INCORPORATES BY REFERENCE THE REASONS AND ARGUMENTS PRESENTED IN THE PETITIONS FOR CERTIORARI SUBMITTED BY HIS CO-DEFENDANTS FIUMARA, BUZZANCA, COPPOLA, COLUCCI, GARDNER AND SWANTON.

Conclusion.

The RICO statute is out of control. It is being applied by overzealous prosecutors to all manner of enterprises that were never intended to come within its ambit. It has become the new darling in the federal prosecutor's nursery. Coupled with

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*One concrete example of how the prosecution manipulated this prejudicial spillage effect from RICO is provided by its summation concerning the Taft-Hartley charges. The prosecution's case against Clemente concerning these charges was marred by an obvious lack of evidence that Clemente did anything to follow-up his conversations with Montella and Buzzanca. To bridge this gap in its case, the prosecution resorted to the ever-malleable claims of RICO enterprise, stating in effect that Clemente's role in that enterprise transformed the isolated conversations into multiple violations of law. (See T. 12323-24.) Similar "RICO-type control" arguments were made in the extortion part of the summation. See, *e.g.* (T. 11247): "Montella starts to see Clemente, paying him $500 a month, just the way he told you, and that's the beginning of the whole effort by this *enterprise* to get money out of Montella and others at least as far as we know about it from the evidence in this case."

conspiracy charges — which is what was done in the instant case — it knows no constraints nor limits. This Court should grant the petition in this case to consider the relationship between the RICO and conspiracy statutes in the context of an alleged "in fact" enterprise which has no legitimate function. This petition raises these important issues — about which there is conflict among the circuits — squarely and directly.

Respectfully submitted,

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Appendix.

Supreme Court of the United States

No. A-880

MICHAEL CLEMENTE,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 27, 1981.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 22nd
day of April, 1981.

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Nos. 80-1972 and 80-2098

In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL CLEMENTE, PETITIONER

v.

UNITED STATES OF AMERICA

VINCENT COLUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the group of individuals associated in this case to commit unlawful acts for profit constituted an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* (both petitioners).

2. Whether the application of the RICO statute to groups of individuals associated for illegal purposes, renders the statute unconstitutionally vague (petitioner Clemente).

3. Whether the district court instructed the jury incorrectly on the RICO conspiracy count (petitioner Clemente).

4. Whether an invalidation of the RICO counts would require reversal of petitioner Clemente's non-RICO convictions.

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In the Supreme Court of the United States

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No. 80-1972

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v.

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VINCENT COLUCCI, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1981. A petition for rehearing was denied on April 14, 1981. The petition for a writ of certiorari in No.

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[1]"Pet. App." refers to the appendix to the petition in No. 80-2098.

80-1972 was filed on May 22, 1981, and the petition in No. 80-2098 was filed on June 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner Clemente was convicted on one count of participating in an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count 1); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2); 35 counts of bribery, in violation of Section 302(b) of the Labor-Management Relations Act ("Taft-Hartley Act"), 29 U.S.C. 186(b) (Counts 49-83); 56 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 (Counts 87-142); five counts of tax evasion, in violation of 26 U.S.C. 7201 (Counts 200, 202, 204, 206, 208); and five counts of filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 201, 203, 205, 207, 209). Petitioner Colucci was convicted on both RICO counts, 13 counts of extortion (Counts 3-6, 13), four counts of bribery (Counts 8-11), and one count of filing a false tax return (Count 212).

Petitioner Clemente was sentenced to concurrent 20-year terms of imprisonment on Counts 1 and 2; six months' imprisonment on each of Counts 49 through 83, to be served consecutively to each other but concurrently with the sentences on Counts 1 and 2; 20 years' imprisonment on each of Counts 87 through 142, to be served concurrently with each other and with the sentences on all other counts; four years' imprisonment on each of Counts 200, 202, 204, 206 and 208, to be served consecutively to each other but concurrently with the sentences on all other counts; three years' imprisonment on each of Counts 201, 203, 205, 207 and 209, to be served consecutively to each other but concurrently with the sentences on all other counts; and a total fine of $50,000.

Petitioner Colucci was sentenced to concurrent five and one-half year terms of imprisonment on Counts 1, 2, 3-6, and 13; one year's imprisonment on each of Counts 8 through 11, to be served consecutively to each other but concurrently with the sentences on all other counts; three years' imprisonment on Count 212, to be served concurrently with the sentences on all other counts; and a total fine of $5,000. The court of appeals affirmed (Pet. App. 1a-31a).

The evidence at trial is related in detail in the opinion of the court of appeals (Pet. App. 3a-12a). Briefly, it established the existence of an association of persons organized for the purpose of controlling all aspects of the New York and New Jersey waterfront business. Petitioner Clemente was the ringleader of the enterprise and petitioner Colucci was president of a New Jersey local of the International Longshoremen's Association (ILA). Other members of the enterprise, who were co-defendants at petitioners' trial, included Tino Fiumara, the New Jersey waterfront "boss"; Carol Gardner, the president of another New Jersey local of the ILA; Thomas Buzzanca, the president of two New York ILA locals; and Gerald Swanton, a vice-president of a shipping company in New York (*id.* at 3a).[2]

The foundation of the enterprise was its control of the ILA in New York and New Jersey. By threatening work stoppages, the enterprise was able to extort money from shipping companies and to influence their decisions regarding the allocation of ship-servicing contracts. Using its control over such contracts, the enterprise was likewise able to extort money from the ship-servicing companies. Only those shipping and ship-servicing companies that paid the

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[2]The joint petition for a writ of certiorari of co-defendants Fiumara, Buzzanca, and Michael Copolla, Fiumara's assistant, is currently pending in this Court. *Fiumara* v. *United States*, No. 80-1800 (filed Apr. 27, 1981).

amounts demanded and otherwise cooperated with the enterprise had their ships' cargos loaded and unloaded without interruption or obtained and retained contracts to provide services (Pet. App. 3a-4a).

The proof against petitioners and their co-defendants largely concerned their individual dealings with William Montella, the principal government witness, who was employed by several ship-servicing companies during the period covered by the indictment (Pet. App. 4a-12a). Montella testified that from 1970 to 1972 he had made payoffs to Swanton in order to retain certain ship-servicing contracts with Netumar Steamship Line for Montella's employer and that Swanton had told him that he was associated with petitioner Clemente, who would share in the payoffs (*id.* at 5a). From 1974 to 1976, according to Montella's testimony, Montella delivered $500 per month in cash to Clemente to retain contracts for a new Montella employer (*id.* at 6a-7a). In 1976, when Montella's bid on behalf of his employer for additional contract work had been rejected, he appealed to Clemente, who advised him how to obtain the work and who demanded an additional $500 per month in payments. From January 1977 through December 1978, Montella testified, he made $1000 monthly payments to Clemente (*id.* at 7a). During the same period that Clemente received payments from Montella, he was collecting approximately $1 million from Netumar itself in return for his arranging to achieve reductions in some gross overcharges by a stevedoring company with which Netumar did business (*id.* at 7a).

As to petitioner Colucci, Montella testified that in 1975 he had agreed to pay a lump sum of $10,000 and monthly payments of $2,000 to co-defendant Carol Gardner and to petitioner Colucci in order to allow a company owned by some friends of Montella's to retain contracts with the Concordia Line for work on the New Jersey waterfront (Pet. App. 8a). When Montella thereafter began receiving separate demands from Gardner and Colucci, Montella

complained to petitioner Clemente, who advised him that he should have approached Clemente initially to avoid having to deal with Gardner and Colucci (Pet. App. 9a). Montella testified further that Clemente told him he should live up to his "commitment," but at Clemente's suggestion he consulted another of the co-defendants, Thomas Buzzanca, who arranged for Montella to make the Concordia Line payments directly to him and who told Montella to advise Colucci and Gardner to await further instructions from Buzzanca (*ibid.*). After transmitting this message, Montella was no longer approached by Gardner and Colucci for Concordia Line payments. During this same period, however, Montella had abandoned efforts to retain a Chilean Line account because of pressure from Colucci and Gardner for payments, which they demanded in the name of their "boss," who, according to Montella, was Tino Fiumara, another of petitioners' co-defendants (*id.* at 10a-11a).

ARGUMENT

1. Petitioners contend (Clemente Pet. 4-6; Colucci Pet. 6-9) that the conduct for which they were indicted and convicted does not fall within the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* They argue that the RICO counts in this case were based on an "enterprise" consisting of an association organized for exclusively illegal ends, and that the RICO statute is applicable only to legitimate enterprises that are subsequently infiltrated by criminal elements. After the filing of the instant petitions, however, this Court expressly held in *United States* v. *Turkette*, No. 80-808 (June 17, 1981), that the RICO statute applies to wholly illegitimate as well as to legitimate enterprises. Accordingly, petitioners' claim must fail.

2. Petitioner Clemente contends (Pet. 6-8) that the RICO statute, as employed in this case, is unconstitutionally vague. Specifically, he argues (Pet. 6) that applying the

RICO statute to an "association in fact formed for the very purpose" of committing illegal acts "renders the enterprise element indistinguishable from a single conspiracy to commit the predicate crimes" and that this "in turn makes it impossible to fathom the meaning of a conspiracy under 18 U.S.C. 1962(d) * * *."

Petitioner's argument misapprehends the meaning of the "enterprise" element of a RICO offense. Under 18 U.S.C. 1961(4), an "enterprise" is an "entity," including, as in this case, a "group of individuals associated in fact." See *United States* v. *Turkette, supra*, slip op. 6. As such, it is not the same thing as a conspiracy, which is an agreement to commit particular unlawful acts. As the Fifth Circuit observed in *United States* v. *Diecidue*, 603 F. 2d 535, 546 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980), the mere fact "[t]hat the formation of the enterprise and the conception of the conspiracy [to commit unlawful acts in furtherance of the enterprise] may have occurred simultaneously in no way detracts from the Act's applicability." Indeed, every court of appeals to have addressed the vagueness claim has rejected it. See *United States* v. *Aleman*, 609 F. 2d 298, 305 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Swiderski*, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Hawes*, 529 F. 2d 472, 479 (5th Cir. 1976); *United States* v. *Campanale*, 518 F. 2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Parness*, 503 F. 2d 430, 440-442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). See also *United States* v. *Huber*, 603 F. 2d 387, 393 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980).

Furthermore, since petitioner Clemente's act of conspiring to commit the predicate acts of racketeering was itself clearly illegal (see 18 U.S.C. (& Supp. III) 1961(1)), he unquestionably had "fair warning * * * as to what conduct is criminal * * *" (*Huddleston* v. *United States*, 415 U.S.

814, 831 (1974)) and was not "forced to speculate * * * whether his conduct [was] prohibited." *Dunn* v. *United States*, 442 U.S. 100, 112 (1979).

3. In instructing the jury on the RICO conspiracy count, the district court stated (Tr. 12614-12615) that "[i]n order to find the defendant * * * guilty of the conspiracy charged in the indictment, you must find beyond a reasonable doubt that at least two connected violations of one or both of the two statutes that I have just described to you in connection with Counts 3 through 142 [the Hobbs Act and "Taft-Hartley Act" counts], were objectives of the conspiracy." Petitioner Clemente contends (Pet. 8-10) that the instruction was incorrect because, under 18 U.S.C. 1962(d), a defendant must be found to have "entered into an agreement with the *personal* objective (*i.e.*, specific intent) of participating in the enterprise's affairs *through* the commission of two or more predicate crimes constituting a pattern of racketeering activity" (Pet. 10; emphasis petitioner's). Petitioner, however, failed to object to this portion of the court's charge (see Pet. App. 25a) and thereby waived his right to challenge it now. Fed. R. Crim. P. 30; see, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). Moreover, a reversal of petitioner Clemente's conviction on the conspiracy count—for which he received a sentence of 20 years—could not affect the length of his imprisonment or have other significant collateral consequences, because he received concurrent 20-year sentences on the RICO counts and on each of the 56 extortion (Hobbs Act) counts (Pet. App. 30a).

At all events, his claim is not persuasive. While it is true that a defendant must have agreed personally to commit or to aid and abet the commission of at least two predicate acts of racketeering in order to be convicted of a RICO conspiracy, the above-quoted instruction can fairly be read to state that requirement. This is especially true when the

instruction is viewed in the context of the court's complete charge to the jury. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). Thus, at the outset of the court's RICO conspiracy instruction (Tr. 12607), the jury was informed that "Count 2 of the indictment charges that six of the defendants [including petitioner] * * * and others known and unknown, conspired to violate federal law *by participating in the conduct of the affairs of the enterprise described in Count 1 through a pattern of racketeering activity*" (emphasis added). See also Tr. 12608 and 12614. In its instructions on Count 1, the court made it clear that a "pattern of racketeering activity" consists of "at least two of the acts of racketeering activity alleged in the indictment" (Tr. 12597). Read together, these instructions correctly and clearly advised the jury that, in order to convict petitioner, it must find that he agreed to participate in the enterprise through the commission of at least two racketeering acts.[3]

4. Petitioner Clemente contends (Pet. 11-14) that if the RICO counts were invalid, his non-RICO convictions also must be reversed because of misjoinder under Fed. R. Crim. P. 8 and because of evidentiary spillover from the RICO counts. Since the Court's decision in *Turkette* removes the predicate for this contention, it plainly affords no basis for further review.

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[3]In any event, petitioner could not have been prejudiced by the instruction even if it was defective. It is implicit in petitioner's joint conviction with one or more of his co-defendants on 91 Hobbs Act and "Taft-Hartley" counts that the jury believed that he had conspired "personally" to commit two or more racketeering acts.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-1972.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

MICHAEL CLEMENTE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

**Reply Brief in Support of
Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.**

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Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

1. Contrary to the Government's contention (Br. Opp. 5),* this Court's recent decision in *United States* v. *Turkette*, 101 S.Ct. 2524 (1981), does *not* dispose of Point I of the petition for certiorari. While *Turkette* holds that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises, the case also holds that "enterprise"and "pattern of racketeering activity" are "separate elements" of an offense under 18 U.S.C. § 1962(c). 101 S.Ct. at 2528-29. Petitioner Clemente maintains that his conviction under § 1962(c) must be reversed because the trial judge did not adequately explain

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* "Br. Opp." denotes references to the Brief for the United States in Opposition to the petition for certiorari.

the separateness of these two elements to the jury. On the contrary, the judge's instructions affirmatively obliterated any distinction between the two elements and permitted the jury to find the defendants guilty of a § 1962(c) offense solely on the basis that they collectively committed a pattern of racketeering activity (see T. 12595-96)* and without a finding of participation in an enterprise "separate and apart from the pattern of activity in which it engages." 101 S.Ct. at 2528-29.

2. The decision in *Turkette* does not deal at all with the issues raised by Point II of the petition for certiorari — which attacks Clemente's conviction under 18 U.S.C. § 1962(d) for RICO *conspiracy*. On the contrary, given the definition of "enterprise" which it adopts, *Turkette* makes it all the more imperative for this Court to grant the petition because, as Point II demonstrates (Pet. 6-8), such a definition of "enterprise" creates intractable definitional problems in the concept of a § 1962(d) conspiracy to violate § 1962(c).

3. The Government *concedes* that

> a defendant must have agreed personally to commit or to aid and abet the commission of at least two predicate acts of racketeering in order to be convicted of a RICO conspiracy . . .. [Br. Opp. 7.]

The Government's claim that the trial judge's instructions adequately communicate this fact is without merit. Indeed, the very excerpts from the instructions which the Government quotes (Br. Opp. 7-8) demonstrate the validity of the points

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* Thus, the judge charged the jury

> In this case, the Government contends that the enterprise was a group of individuals associated in fact to control the waterfront in the New York area through a pattern of racketeering activity. [T. 12596.]

made in the petition (Pet. 8-10) And when these excerpts are read in the context of the entire instruction, Clemente's claim becomes all the stronger.**

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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** The Government argues that Clemente failed to object to the aspect of the RICO conspiracy instruction at issue, and thereby waived his right to challenge it now (Br. Opp. 7). Two points must be made in response. First, given the extremely unsettled nature of the law regarding RICO at the time of the trial, the failure to frame a specific objection to the aspect of the conspiracy instruction at issue should not be construed as a waiver, especially in light of the general objection that had been made to the underlying theory of the RICO counts. Second, even assuming that a failure to object could be construed as a waiver regarding an error in the instruction that was relatively insignificant, such a failure cannot be construed as a waiver regarding the type of error at issue here. It is well established that where, as here, the defect in the instructions is a fundamental one, going to the definition of the essential elements of the offense charged, the defect can and should be noticed on appeal as "plain error." 8A *Moore's Federal Practice — Criminal Rules*, ¶ 30.04 and cases cited at p. 30-16 n.8. (2d ed. June, 1981 Revision).